LIBRARY
SUPREME COURT, U. S.

FILED
MAR 21 1969
JOHN F. DAVIS, CLERK

No. 1128

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

CONSOLIDATED COPPERSTATE LINES, *Appellant*

vs.

THE UNITED STATES OF AMERICA ET AL., *Appellees*

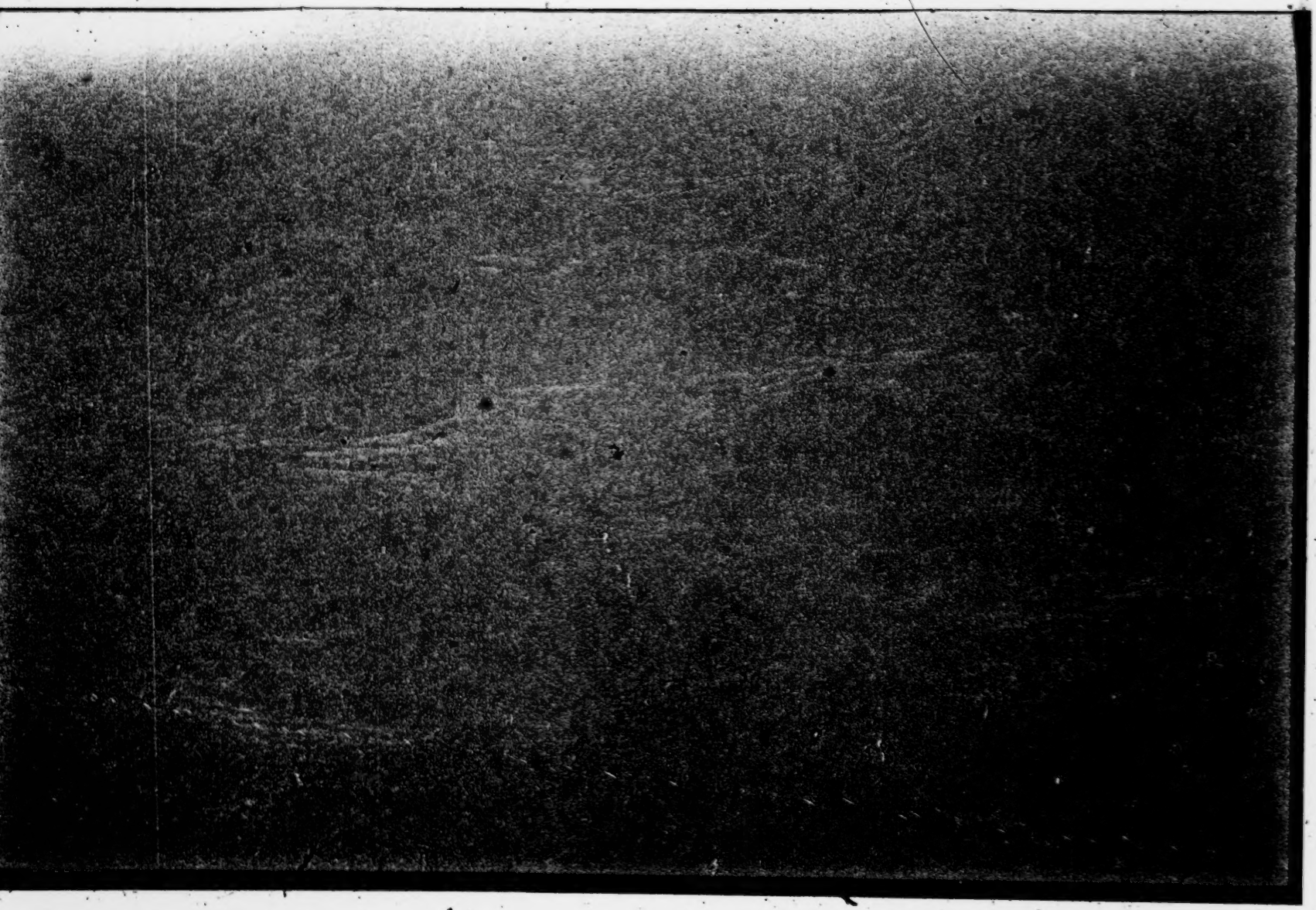
On Appeal From The United States District Court For
The Central District of California

Motion To Affirm

REAGAN SAYERS
Century Life Building
P. O. Box 17007
Fort Worth, Texas 76102
Counsel for Ryder Truck Lines, Inc., Appellee

CLAYTE BINION, III and
RAWLINGS, SAYERS & SCURLOCK
Century Life Building
P. O. Box 17007
Fort Worth, Texas 76102
Of Counsel

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone ED 2-4070



No. 1128

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

CONSOLIDATED COPPERSTATE LINES, *Appellant*

vs.

THE UNITED STATES OF AMERICA ET AL., *Appellees*

On Appeal From The United States District Court For
The Central District of California

Motion To Affirm

Pursuant to Rule 16.1.(c), THE SUPREME COURT OF THE UNITED STATES REVISED RULES (1967), Ryder Truck Lines, Inc., Appellee, moves that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a final judgment (J. S. App. A 1-5) of a three-judge District Court affirming orders of the Interstate Commerce Commission (J. S. App. B 6-52) in an action brought by appellant to set aside such orders. The Commission's orders denied, under Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), the acquisition by appellant of a portion of the certificated motor common carrier oper-

ating rights of England Transportation Company, a Louisiana corporation, and England Transportation Company of Texas, a Texas corporation, and under Section 207 of the Interstate Commerce Act, 49 U.S.C. § 307, a certificate of public convenience and necessity to conduct motor common carrier operations over regular routes similar to the operating rights sought to be acquired as aforesaid, all generally between New Orleans-Baton Rouge, La. and Houston, Tex. The principal bases in the entire Commission's denial (J. S. App. B 6-52) were (1) the "substantial unauthorized" operation conducted by appellant and the England companies; (2) the "greatly differing use" to which appellant would put the involved operating rights following approval of the transfer; (3) much of the traffic which appellant would and has generated is at the expense of existing carriers, and particularly this appellee Ryder Truck Lines, Inc. showed that a substantial amount of traffic which it formerly received in interline at Houston from appellant had been diverted to the latter's single line service under temporary authority; and (4) the lack of need shown for the extension of appellant's authority, coupled with the questionable aspect of its fitness in conducting temporary operations impelled the Commission to deny the application for the new authority sought under Section 207 of the Interstate Commerce Act.

Chronologically and pertinent hereto:

(1) In October 1964 the Commission granted temporary authority "pending the determination" by the Commission of the application for appellant to purchase such operating rights.

(2) Operations under such *temporary* authority were commenced October 28, 1964 by appellant and have been continued until this date.

(3) Applications under 49 U.S.C. § 5 to purchase such operating rights (finance application) and under 49 U.S.C. § 307(a) (extension application) were prosecuted on joint hearings, protested by carrier appellees, and continuing for many weeks, with over 150 witnesses, 229 exhibits, and 4,000 pages of transcript in the record. The hearing examiner recommended the grant of the application (J. S. App. C).

(4) After consideration of the record, the numerous briefs and the pleadings of all of the parties, the *entire* Commission denied the two applications July 31, 1967, finding that the approval of the finance application would not be consistent with the public interest, and that the public convenience and necessity did not require the grant of the extension application (J. S. App. B). After the consideration of petitions for reconsideration and replies, on March 4, 1968 the Commission adopted its prior report and affirmed its prior denials (J. S. App. D).

(5) Appellant appealed to the United States District Court for the Central District of California. Such court granted a temporary restraining order against the enforcement of such order of denial, pending trial on the merits before the three-judge court, thereby in

practical effect keeping in force and effect the "temporary authority" theretofore granted by the Commission and staying the denial thereof.

(6) After the filing of briefs, trial and argument, on December 2, 1968 the three-judge District Court affirmed the Commission's denial in a unanimous opinion (J. S. App. A).

(7) On December 12, 1968 the Commission entered its order giving effect to the decision of the three-judge court and making effective the Commission's prior denial as of February 10, 1969.

(8) Appellant sought a stay from the three-judge court pending appeal to this Court, which was denied, after consideration of briefs by that court, on January 27, 1969.

(9) Upon consideration of the application of counsel for appellant and of the opposition of certain appellees, including appellee Ryder, thereto, on February 4, 1969, Mr. Justice Harlan issued his memorandum and order staying the order of the Commission of December 12, 1969, pending this Court's action on the Jurisdictional Statement, conditioned upon appellant perfecting its appeal and the filing of its Jurisdictional Statement of March 10, 1969, ordering that if the appeal is dismissed or the judgment summarily affirmed, such stay shall expire immediately, but should the Court note probable jurisdiction or postpone consideration of the jurisdictional aspect until the hearing of the

cases on the merits, further applications for a stay pending disposition of the appeal may be filed for the consideration of the entire Court within one week thereafter.[1]

ARGUMENT

The decision below is correct, and the case presents no question substantial enough to warrant plenary consideration by this Court.

1. In a determination whether an acquisition subject to Section 5(2) should be approved as consistent with the public interest, "[t]he statute entrusts the Commission with the duty to decide what considerations . . . shall be given weight." *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 127; *McLean Trucking Co. v. United States*, 321 U.S. 67, 86-88; *Schwabacher v. United States*, 334 U.S. 182, 193. As in the case of the extension application for a certificate under Section 207 of the Interstate Commerce Act, the Commission chose to give weight to the applicant's fitness, which it might lawfully do. *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 127. The Commission found here in the Section 5(2) application that operations engaged in by the England companies for which it held no operating authority were unlawful and may not be considered (J. S. App. B 41); that appellant had operated for a brief period following the initiation of temporary operation un-

[1] This order relates also to *Strickland Transportation Company, Inc. v. United States of America et al.*, No. 1141, Oct. 1968 Term of this Court, but this appellee Ryder is not a party to such proceedings before either the Commission, the three-judge court, nor this Court, having no justiciable interest therein.

lawfully, and there is an inference that it continued to do so (J. S. App. B 41); that both the England companies and appellant had "operated an unlawful cross-radial haul of New Orleans on traffic bound from Baton Rouge to Houston," that such "conduct of an operation for which no authority exists, and in addition, the brash statement of its intention to continue the unlawful movement constitutes a willful and defiant disregard for regulation which brings the fitness of" appellant "into question" (J. S. App. B 42, 43). It also found that on the basis of the use to which the operating rights sought by appellant were put by the England companies prior to the transaction, coupled with the substantial unauthorized carriage both before and during temporary authority, and the greatly differing use to which those rights would be put following approval, the transaction would not be in the public interest and will be denied (J. S. App. B 43). The court below held that in a § 5 proceeding, the burden is upon the applicant (appellant) to show that a new service will not be created, and that if a new competitive service was thereby created, then the applicant (appellant) must present proof under a separate § 207 application that the public convenience and necessity requires the granting of the application (J. S. App. A 4, 5). There is no basis for this Court to depart from its general rule aforesaid that the Commission shall be the arbiter of the considerations, particularly when this Court has heretofore approved the considerations here made by the Commission of illegality and resulting new service.

2. Appellant complains (J. S. App. A 9-12) that

the Commission compartmentalized and segregated the evidence in the § 5 finance application from the evidence in the § 207 extension of operating rights application and did not consider past user of appellant under temporary authority nor consider all of the evidence and the record as a whole in the disposition of both applications. Such complaint is contrary to the Commission disposition, as the Commission adopted stated rationale in the disposition of both applications. The court below correctly held (J. S. App. A 5) that the Commission considered the applications in one report and order and "did not separate item by item the findings in regard to each application," that the method of drafting the report cannot be fatal to the Commission's orders, that form does not govern substance, and "the Commission's findings in the § 207 proceeding are fully applicable to the same issues in the § 5 matters." Indeed the Commission's report made this integrated consideration of all of the evidence in both applications clear by first considering in the § 5 application *inter alia* the illegality of appellant's operations and the resulting different use of the involved operating rights proposed by appellant as bearing on the statutory concept of public interest (J. S. App. B 41-43); secondly considering in the § 207 application that the public convenience and necessity has not been shown for the institution of such service by appellant, nor have the supporting shippers shown a need for any service that cannot be supplied by existing carriers, and that much of the traffic which appellant would generate would be at the expense of existing carriers, particularly this appellee Ryder (J. S. App.

B 47); and then concluding (J. S. App. B 48):

> "The lack of need shown for an extension of Copperstate's authority, coupled with the questionable aspect of its fitness in conducting temporary operations impel us to deny the application for new authority under section 207."

Thus, the Commission considered *both* the § 5 and the § 207 evidence and then grouped such for final disposition upon its stated considerations. Clearly the decision and orders were predicated on stated rationale grounded on basic and essential findings of fact and conclusions of law, and appellant's objection to the form of the report is without effect. *Interstate Commerce Commission v. Parker*, 326 U.S. 60 (1945); *Gilbertsville Trucking Co. v. United States*, 371 U.S. 115 (1962); *Rochester Telephone Co. v. United States*, 307 U.S. 125 (1939).

3. Appellant complains (J. S. 12-15) that the Commission adopted standards in the determination of appellant's applications differing from those in *Consolidated Freightways Corp. of Del-Control-Southern Plaza Exp., Inc.*, 104 MCC 194, thereby resulting in arbitrary and capricious action herein, relying on *Acme Cartage Co. v. United States*, 290 F. Supp. 453 (D.C. Wash. 1968) [related to unpredictable enforcement of *rules* in which no discretion was involved as in the decisional process here] and *NLRB v. Mall Tool Co.*, 119 F. 2d 700, 702 (C.A.-7 1941) [related to proceedings under National Labor Relations Act for loss of employee wages on the basis of a stated decisional policy of the NLRB]. *Mall* was the basis for the lower

court overturning a Commission's order as reaching different results in other applications in *Dixie Highway Exp. v. United States*, 242 F. Supp. 1016 (S.D. Miss. E.D. 1965), 268 F. Supp. 239 (S.D. Miss. E.D. 1967), rev. by this Court 389 U.S. 409 (1967). The doctrines of res judicata, stare decisis and equitable or collateral estoppel do not apply to decisions of the Commission, and the Court is not concerned with decisional consistency by the Commission. *Virginian R. Co. v. United States*, 272 U.S. 658, 666 (1926); *Western Paper Makers' Chemical Co. v. United States*, 271 U.S. 268, 271 (1926).

4. The summation of all complaints of appellant is that it is dissatisfied with the conclusion reached by the Commission and the court below on the evidence. The Commission, not the courts, is the arbiter of the evidence, and where, as here, the findings of fact and conclusions of law are predicated on stated criteria adhered to, this Court has not interfered with the proper exercise of Commission discretion. *United States v. Pierce Auto Freight Lines*, 327 U.S. 515 (1946); *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U.S. 541 (1912); *Rochester Telephone Co. v. United States*, 307 U.S. 125 (1939).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

REAGAN SAYERS
Century Life Building
P. O. Box 17007
Fort Worth, Texas 76102
Counsel for Ryder Truck Lines, Inc., Appellee

CLAYTE BINION, III and
RAWLINGS, SAYERS & SCURLOCK
Century Life Building
P. O. Box 17007
Fort Worth, Texas 76102
Of Counsel

DATED: March 1969.